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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL,

Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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INDEX

PAGE

I—The Secretary of State Lacked the Authority to Prevent the Petitioners from Travelling Abroad 1

A. The Statute Does Not Expressly Grant any Authority to the Secretary 3

B. The Legislative History of the 1918 and 1941 Statutes 7

C. The Argument that 8 U. S. C. § 1185 is to be Read in Conjunction with 22 U. S. C. § 211a 10

D. The Statute, Under the Government's View, Is an Invalid Delegation of Power 12

II—Assuming the Existence of Power in the Secretary to Control Travel, the Regulations Violate Constitutional Rights 19

A. "Reasonable Restrictions" Upon a Fundamental Right 19

B. The Alleged Emergency 22

C. The First Amendment 28

Conclusion 36

Cases Cited

Allgeyer v. Louisiana, 165 U. S. 578 5

American Communications Association v. Douds, 339 U. S. 382 ..... 19, 32, 33

American Newspaper Publishers Association v. National Labor Relations Board, 345 U. S. 100 32

Bauer v. United States, 244 F. 2d 794 27

Blackmer v. U. S., 284 U. S. 421 21

Burstyn v. Wilson, 343 U. S. 495 11

Cantwell v. Connecticut, 310 U. S. 296 11

	PAGE
Chastleton Corp. v. Sinclair, 264 U. S. 543	25, 26, 27
Cole v. Young, 351 U. S. 536	34
Cox v. New Hampshire, 312 U. S. 569	22
Curtis v. Benson, 222 U. S. 78	18
Dayton v. Dulles, Oct. Term 1957, No. 621	3, 8, 20
Dean Milk Co. v. City of Madison, 340 U. S. 349	34
De Jonge v. Oregon, 299 U. S. 353	31
Dennis v. United States, 341 U. S. 494	22
Dulles v. Nathan, 225 F. 2d 29	34
East New York Savings Bank v. Hahn, 326 U. S. 231	26
Ex parte Endo, 323 U. S. 283	3, 8
Feiner v. New York, 340 U. S. 315	22
Garner v. Board of Public Works, 341 U. S. 716	31
Gelling v. Texas, 343 U. S. 960	11, 13
Greene v. Home Secretary [1942] A. C. 284	20
Hague v. C. I. O., 307 U. S. 496	22, 29
Hannegan v. Esquire, 327 U. S. 146	3, 18
Hirabayashi v. United States, 320 U. S. 81	20
In re Ah Fung, 1 Fed. Cases 213 (D. Calif.)	31
Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479	3
Korematsu v. United States, 323 U. S. 214	20
Kovacs v. Cooper, 336 U. S. 77	20
Largent v. Texas, 318 U. S. 418	11, 13
Leedom v. International Union of Mine, Mill and Smelter Workers, 352 U. S. 145	35
Liversidge v. Anderson [1942] A. C. 206	20, 23
Lovell v. Griffin, 303 U. S. 444	31
Ludecke v. Watkins, 335 U. S. 160	
National Labor Relations Board v. District 50, United Mine Workers, Oct. Term 1957, No. 64, 2605 Law Wis. 41, 49	32
Near v. Minnesota, 283 U. S. 697	31

PAGE

Niemotko v. Maryland, 340 U. S. 268 11

Panama Refining Co. v. Ryan, 293 U. S. 388 ..... 13, 14, 15

Rex v. Halliday (Ex parte Zadig) [1917] A. C. 260 .. 20
Rex v. Home Secretary (Ex parte Budd) [1942] 2 K. B. 14 20

Saia v. New York, 334 U. S. 558 11
Schechter v. U. S., 295 U. S. 495 ..... 14, 15
Schenck v. United States, 249 U. S. 47 32
Schneider v. State, 308 U. S. 147 ..... 31, 35
Shaughnessy v. U. S. ex rel. Mezei, 345 U. S. 206 .. 15
Staub v. Baxley, 355 U. S. —, 78 S. Ct. 277 11

United States v. Curtiss Writght Corporation, 299 U. S. 304 16
United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407 5
United States v. Minker, 350 U. S. 179 34
United States v. Peace Information Center, 97 F. Supp. 255 14
United States v. Witkovich, 353 U. S. 194 34
United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537 15
Urtetiqui v. D'Arbel, 9 Pet. 692 7

Watkins v. United States, 354 U. S. 178 34
Winters v. New York, 333 U. S. 507 10
Woods v. Miller, 333 U. S. 138 27
W. B. Worthen Co. v. Thomas, 292 U. S. 426 27

Yates v. United States, 354 U. S. 298 22
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 ..... 6, 10, 18, 23

Constitution, Treaty and Statutes

CONSTITUTION OF THE UNITED STATES:

First Amendment 14, 19, 22, 28, 32, 34

Fifth Amendment 1, 19

PAGE

TREATY:

Department of State (1955) Treaties and Other International Acts Series 3409, Exchange of Medical Films 24

STATUTES:

Act of May 22, 1918, c. 81, 40 Stat. 559 ..... 2, 7, 8, 9, 10, 13, 25, 28, 34

Act of June 21, 1941, 55 Stat. 252 ..... 2, 7, 8, 9, 10, 13, 25, 28, 34

District Rent Act of 1919, 41 Stat. 297 26

Immigration and Nationality Act, June 27, 1952, 66 Stat. 190, 8 U. S. C. § 1185 ..... 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 25, 26, 29, 33, 34

Internal Security Act, Sept. 23, 1950, 64 Stat. 993 50 U. S. C. § 785 ..... 4, 5, 6, 8, 9, 18, 24, 25, 29, 34

§ 813 34

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. § 159(h) amending the National Labor Relations Act 33, 35

New York Moratorium Law, N. Y. Laws of 1943, Ch. 93 26

Trading With the Enemy Act of 1815, 3 Stat. 199 10

18 U. S. C. §§ 1541-1546 28

22 U. S. C. § 211a, July 3, 1926, 44 Stat. 887 2, 10, 11, 12, 25

Departmental Orders, Regulations, etc.

PASSPORT REGULATIONS:

22 C. F. R. (1954 Supp.) §§ 51.135-51.170 28-34

§ 51.135(b) 29

§ 51.142 ..... 30, 35

Other Congressional and Executive Materials

PAGE

96 Cong. Rec. 14585-14623 (1950) 24

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H. Rep. No. 485, 65th Cong., 2nd Sess. 13

Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, 84th Cong., 1st Sess. (Hennings Hearings) 32

Texts, Articles and Miscellaneous Materials

Brecht, The Concentration Camp, 50 Col. L. Rev. 761 (1950) 20

Bramstedt, Dictatorship and Political Police (1945) 20, 31

The Economist, March 29, 1958 23

Emerson, The Doctrine of Prior Restraint, 20 Law and Contemp. Prob. 648 (1955) 22

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O'Brian, National Security and Individual Freedom (1955) 29, 30, 31

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Sutherland, Statutes and Statutory Construction, § 6206 5

Wyzanski, Freedom to Travel, Atlantic Monthly (Oct. 1952) 22

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REPLY BRIEF FOR PETITIONERS

I.

The Secretary of State Lacked the Authority to Prevent the Petitioners from Travelling Abroad

The Government, in this Court, has altered its position considerably from that taken below in urging the validity of the actions of the Secretary of State in denying passports to the petitioners. It will be helpful at the outset to indicate the issues now conceded by the Government and which are, therefore, no longer a matter of controversy between the parties.

(1) The right to travel abroad is a fundamental constitutional right to be equated with the right to travel from state to state [hence can be abridged only in conformity with the Fifth Amendment (Gov't. Br. pp. 26-27).

(2) 22 U. S. C. § 211a does not grant either the President or the Secretary of State the authority to control travel (Gov't. Br. p. 43, fn. 37, 44).

(3) There is no inherent power in the Executive branch to restrict travel abroad of citizens (Gov't. Br. pp. 90-91, fn. 97).

The controversy as to the source of the Secretary's authority to restrict travel by the petitioners is thus narrowed to the Government's contention, made here for the first time, that the sole source of authority for the Secretary's power to determine which citizens may travel and which may not stems from the provisions of 8 U. S. C. § 1185. The authority claimed for the Secretary under the statute is implied by the Government on the basis of the following reasoning:

(1) The language of the statute as well as the legislative history of the predecessor Acts of 1918 and 1941 show a clear intent of Congress to control travel;

(2) Since the Secretary's authority to issue passports was the device employed to effectuate this control of travel, Congress intended to delegate to the Secretary discretion to determine who may and who may not travel.

According to the Government, it follows, therefore, that 8 U. S. C. § 1185 "must be read as a delegation to the Secretary of State of authority * * * to prevent, where necessary or appropriate, the departure or entry of individual citizens by denying them the passports necessary to such travel" (Gov't. Br. pp. 52-53). As we will demonstrate, however, this argument is logically unsound and poses insuperable constitutional difficulties.

A. The Statute Does Not Expressly Grant any Authority to the Secretary

By its terms, § 1185 contains no express grant of power to the Secretary to control travel. Although it makes it a crime to leave the country without a passport, it contains no provisions empowering the Secretary to determine who may or who may not leave the country. It neither sets forth standards as a guide for making such a determination nor does it commit that function to the Secretary.[1] So large and sweeping a grant of power to the Executive as is claimed here is not ordinarily implied in the absence of an unequivocal Congressional declaration. *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479; *Hannegan* v. *Esquire*, 327 U. S. 146. On the contrary, as this Court said in *Ex parte Endo*, 323 U. S. 283, at 300:

> "* * * We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law-makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

The Government contends, however, that this statute, which contains no express grant of power, is meaningless unless it is interpreted as authorizing the Secretary, in his unfettered discretion, to deprive citizens of the right to travel (Br. pp. 56-57).[2] But this is a fictitious, not a real, dilemma. Contrary to the Government's view, there are alternative interpretations of the statute, interpretations

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[1] Indeed, it was not until these cases reached this Court, that the Government discovered that § 1185 contained a grant of power to the Secretary.

[2] In its brief in *Dayton* v. *Dulles*, No. 621, the Government carries this argument one step further, contending that the provision would be entirely futile unless the Secretary could bar citizens from travel on the basis of secret evidence, and without judicial review.

to be preferred to that of the government, since, as we show below, the Government's view of the statute would only serve to render it unconstitutional.

In the first place, on the face of the statute, it is quite conceivable that Congress did not intend to deprive anyone of the right to travel, but intended only that if one wished to travel, he must first obtain a passport so that the Government would have a record of who travels and where and when. This is not an uncommon approach to licensing statutes. Thus, all jurisdictions in this country make it a crime to operate a motor vehicle without first obtaining license tags from the responsible Commissioner of Motor Vehicles. It has never been suggested that a provision of this nature contains an implied power to the Commissioner to refuse to issue license tags in his discretion. There is no more reason to imply such power in the Secretary and every reason against such an implication.

Secondly, even if § 1185 is considered to be a travel control statute, it does not follow that the Secretary is thereby empowered to make the policy judgment as to who may and who may not travel. It is more logical to assume that the standards for the application of any travel control program would be supplied by Congress and not by the Secretary. And as we show in our main Brief (pp. 33, 36), Congress has in fact done so in the provisions of the Internal Security Act of 1950. Thus § 1185 can be given the necessary meaningful content as a travel control statute if read in conjunction with the Internal Security Act of

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[3] Concededly, since the statute has no legislative history on this point (Gov. Br. p. 48, fn. 46, p. 52, fn. 53), there is no reason to reject this interpretation of the provision. We treat below, pp. 7-10 with the Government's contention that § 1185 should be interpreted in the light of the legislative history of earlier statutes.

1950.[4] It is true that if the prohibition of § 1185 is applied within the confines of the 1950 Act, it would have a narrower scope than that claimed by the Secretary and would frustrate his program of travel control. It would not, however, leave the statute without any content and hence would not make it a nullity. Thus, the dilemma posed by the Government does not, in fact, exist. It results only from the Secretary's assumption that the welfare of the country requires that he have power to control travel in his uncontrolled discretion, and that, therefore, of necessity Congress must have granted him that power. Such bureaucratic empathy, however, is no index of Congressional intent. And as Mr. Justice Holmes said, dissenting, in another situation involving freedom of speech: "it would take very strong language to convince me that Congress ever intended to give such a despotic power to any one man." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U. S. 407, 437.

There is a positive reason for not implying this power: here involved are a liberty of movement admitted by the Government (Br. p. 26) and the right of each petitioner "to live and work where he will." *Allgeyer v. Louisiana*, 165 U. S. 578, 589. These rights are of particular relevance to petitioners to whom the ability to travel abroad is an essential adjunct to their professions. Statutes in derogation of such constitutional rights, like those in derogation of the common law, must be strictly construed. *Sutherland*, Statutes and Statutory Construction, § 6206.

The Government argues (Br. p. 73) that the 1950 Internal Security Act has no relevance here because it imposes criminal penalties on the application for and granting of

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[4] It is irrelevant in the consideration of Congressional intent that these provisions have not yet become effective because the full administrative and judicial process has not as yet been completed with respect to any organization. Congress must have assumed that the 1950 Act would some day be effective. Moreover, if, in fact, Congressional intent has become frustrated because of the failure of the 1950 Act to become effective, it still remains the province of Con-

a passport. Hence, according to the Government, the statute is not indicative of the standards prescribed by Congress as to who may or who may not obtain a passport for the purpose of travel, nor is it a limitation on the power elsewhere granted to the Secretary to prescribe such standards. The fallacy in this argument is that there is no statute granting the Secretary power to prescribe such standards,[5] and Congress has nowhere else spoken on the standards to govern the Secretary in granting or denying a passport. Finally, the Government has elsewhere admitted that Congress in the Internal Security Act has identified a "narrow class with precision as one totally ineligible for passports." (See our main Brief, p. 35, ftn. 22.)

The Government also argues that our view of § 1185 is impermissible, since it would require the Secretary to grant passports in all cases where previously he had the discretion to deny passports (Govt. Br. pp. 44, 57). But this is precisely the result which must be reached. For whatever power or discretion the Secretary may have had to deny passports at the time when a passport was merely a political document,[6] that power is of necessity destroyed when the

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[5] This same fallacy underlies the Government's contention that the 1950 Act is not to be read as intending to "narrow the Secretary's traditional discretion". (Br. p. 73). Although the Secretary may have had a "traditional discretion" to deny passports when a passport was merely a political document, he does not have and never did have a "traditional discretion" to prevent travel abroad by citizens. Accordingly, to interpret the 1952 Act, dealing with travel control, in the light of the 1950 Act, dealing with the same subject, does not in any way limit or interfere with any traditional discretion of the Secretary, since he has none in this field. Concededly, his only power to control travel must flow from a specific mandate of Congress.

Of course, even if the Secretary had such a "traditional discretion" to control travel, it would have been disposed of by the 1950 Act. "* * * Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; * * *." Mr. Justice Clark concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 884.

[6] See, however, our discussion in footnote 10.

passport becomes a prerequisite to the constitutional right to travel. To suggest otherwise would mean that the Secretary could then, in his unlimited discretion, deny citizens a constitutional right. Indeed, this same result must be reached even in the absence of § 1185. For, even apart from the statutory prohibition against travel without a passport, the course of history and international relations has altered the character of a passport from the mere political document that it was at the time of *Urtetiqui* v. *D'Arbel*, 9 Pet. 692 (See Gov't Br. p. 29) to a necessary prerequisite for travel. (See our main Brief at p. 18.)

B. The Legislative History of the 1918 and 1941 Statutes.

The Government argues, that the 1952 Act, since it was in effect a re-enactment of the 1918 and 1941 statutes, must be read in the light of the legislative history of these statutes. There are, however, several considerations which militate against the Government's conclusion from the legislative history of those statutes that the Secretary is empowered today to control travel in his unlimited discretion.

In the first place, each statute was enacted in the light of a precise existing situation, was directed to a precise evil, and was limited in duration to that precise evil. Thus, the 1918 statute was enacted during World War I for the precise purpose of preventing espionage and sabotage on behalf of the German Government (See Gov't Br. pp. 46-48). By its terms it expired on the termination of that war. The 1941 statute, enacted prior to our entrance into World War II, but in the light of existing hostilities, was also enacted in order to impede espionage activities on behalf of the German government of that date (Gov't Br. pp. 50-51). That statute, too, was by its terms, of limited duration (See our main Brief at p. 30).

Even if these statutes are construed as containing a broad grant of power to the Secretary to control travel,

that power, broad as it was, since it contained a limitation on constitutional rights, would be restricted to the precise purpose for which it was enacted, *i.e.*, the protection of the war effort in World War I and II against espionage and sabotage. Nothing in the legislative history of either statute supports the conclusion that the Secretary was empowered to prescribe general political standards as a condition of the right to travel.[7] Cf. *Ex Parte Endo*, *supra*. Nor is there anything in this legislative history to suggest that the statute was enacted as a measure to control travel by Communists or Communist sympathizers. Moreover, unlike the situation which obtained at the time of the passage of the 1918 and 1941 statutes, at the time of the passage of the 1952 legislation there were in effect specific restrictions on the granting of passports under the Internal Security Act of 1950. And the restrictions imposed by that Act are precisely in the field, *i.e.*, Communism, covered by the Secretary's regulations.

Even assuming that the legislative history of the 1918 and 1941 statutes demonstrates a Congressional intent to vest in the President, for the periods covered by those statutes, an unfettered discretion to prevent travel abroad, without any limits or standards whatever, this would not advance the Government's case. As set out in our main Brief (pp. 28-30) and as developed more fully below, such a view of those statutes would only result in their nullification. There would be little purpose in transporting into

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[7] Neither in the case of the present petitioners, nor in the case of the petitioner in *Dayton* v. *Dulles*, has the Secretary found or suggested that it was necessary to prevent their travel abroad in order to protect the country against espionage or sabotage. Certainly, so far as the present petitioners are concerned, nothing in the voluminous allegations against them asserted by the Department warrants any inference of their engaging in such activities.

the 1952 statute the infirmities of the 1918 and 1941 statutes, since to do so would result only in destroying the 1952 statute. Unless the statute is to be completely nullified, its interpretation should be confined within constitutional limits.

Moreover, there is no administrative history of these statutes that would justify an inference of Congressional affirmation of a power in the Secretary of State to control the travel of citizens in his unlimited discretion. As noted in the Government's Brief (pp. 54-55, fn. 55), the 1918 and 1941 statutes show a history of enforcement of the provisions relating to travel by aliens but no history of enforcement of the provisions authorizing restrictions on citizens.[8] The lack of invocation of this authority and the resulting absence of court cases interpreting and applying the authority granted is easily explicable in the light of historic events. Of necessity, citizens did not travel during the actual hostilities that obtained during both World Wars I and II. Moreover, as conceded by the Government, political tests as a condition of the right to travel were not generally required by the Secretary until sometime in 1950 (Br. p. 64). Thus, prior to 1950, there were no occasions for judicial consideration of this claimed power since it was invoked, if at all, in only rare instances.

In any event, so far as it may have bearing on congressional intent in 1952, the history of the 1918 and 1941 statutes show at most an unexercised delegation of power to the executive to prevent travel by citizens. Consequently,

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[8] See *infra*, pp. 15-16 for the entirely different constitutional basis upon which the governmental power to restrict travel by aliens has been rested.

there is no basis for inferring that Congress by the 1952 statute was indicating its approval of any executive conduct.[9]

C. The Argument that 8 U. S. C. § 1185 is to be Read in Conjunction with 22 U. S. C. § 211a

As we have already indicated, the Government concedes that 22 U. S. C. § 211a does not contain a grant of authority to the Secretary to control travel in any respect. The Government, indeed, goes further and maintains that § 211a granted no authority to the Secretary but was only a confirmation of his inherent authority to issue passports (Br. 32). We will concede for purposes of argument that so long as a passport was a political document and not a prerequisite to travel, the discretion to grant or deny a passport lay in the executive department and was not subject to judicial review at all, since it was purely a political matter.[10] So long as citizens could travel abroad without a passport, they could not complain to the courts if the Secretary of State told them they could travel

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[9] The Government's contention (Br. pp. 93-95) that "Congress has * * * enacted without challenge, over the past 143 years, legislation similar to that now in force" is patently untenable. Aside from the 1918 and 1941 statutes, which as is here shown were never sustained or apparently even applied as to citizens, the Government recites only an 1815 statute forbidding citizens to cross into enemy territory (Br. p. 44). The statute, limited as it was in scope, was also of extremely short duration, since the War of 1812 was ended shortly thereafter. See Mr. Justice Frankfurter concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 613.

Moreover, the age of the statutes and their existence on the books in the absence of judicial validation are no indicia of validity. Cf. *Winters* v. *New York*, 333 U. S. 507. For example the Government recites that during the Civil War, the Secretary of State imposed travel controls without congressional authority (Br. p. 44). By the Government's own admission, the Secretary lacked power to do so.

[10] Because it bears no relevance to the issues in this case which involve the constitutional right to travel, we have not directly challenged the Government's assertion that the Secretary was authorized in his discretion to deny a passport where such denial did not deprive the citizen of the right to travel. It should be noted, however, that

abroad, but would not have the right to call upon this government to protect them in the event of difficulty. This denial of political protection involved no impairment of constitutional rights and was a matter solely within the discretion of the Secretary.

But one cannot jump from that premise to the conclusion that the Secretary has any discretion whatever to control travel. Nor is it permissible to assume, in the absence of an unequivocal declaration by Congress, that it intended by 28 U. S. C. § 1185 to equate the unreviewable discretion of the Secretary to make a political decision with an unreviewable discretion to deny a constitutional right.

This Court has repeatedly condemned statutes which required the obtaining of a permit from any government official as a prerequisite to the exercise of a constitutional right. *Saia* v. *New York*, 334 U. S. 558; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Niemotko* v. *Maryland*, 340 U. S. 268; *Burstyn* v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960, and most recently, *Staub* v. *Baxley*, 355 U. S. —, 78 S. Ct. 277 (See quotation from the *Staub* case in our main Brief, at p. 29.)

Thus, the contention of the Government that § 1185, read in conjunction with § 211a, grants to the Secretary the

this position of the Government has not been undisputed. Although, as indicated in its brief (pp. 35-37), some Secretaries and Attorneys General took the position that the Secretary had unlimited discretion in this field, other Secretaries and Attorneys General took the contrary position and argued that a citizen had a right to a passport which could not be denied. See *e.g.*, the authorities cited in Department of State, *Foreign Relations of the United States* (1907), pp. 920, 1083; also Freund, *Administrative Powers Over Persons and Property* (1928) 97, 519-521, and particularly the prescient warning "It would mean an executive power of a political character over individuals quite out of harmony with American legislative practices" (p. 97). This Court has never considered the problem and aside from the dicta recited by the Government at pp. 38-39 of its brief, there is no judicial authority on the question.

power in his unfettered discretion to withhold a permit for the admittedly constitutional right to travel would only serve to render the statute unconstitutional.[11]

D. The Statute, Under the Government's View, Is an Invalid Delegation of Power

Finally, as we have shown (main Br. pp. 28-30), the statute, if given the interpretation urged by the Government, would constitute an invalid delegation of legislative authority since it contains no standards to serve as a guide as to which citizens may travel and which may not. The Government suggests two answers to this problem, neither of which is tenable.

The Government claims that the statute does impose certain standards (Br. p. 97). It points to the fact that the statute can be invoked only in case of war or proclaimed national emergency.[12] But this deals only with the occasion for invocation of the statute and does not in any way furnish any standards as to the basis for classifying those

[11] The Government suggests (Br. p. 91, fn. 98) that it is not open for the petitioners here to challenge the constitutionality of 8 U. S. C. § 1185, since the issue was not raised in the complaint in the District Court, and further that if the issue had been raised, this would have required the convening of a three-judge District Court. The short answer to this is that we maintained below, as we maintain here, that the Secretary is not granted authority under any statute to prevent the travel of the petitioners abroad. Indeed, we did not understand at the time that we filed our complaint that the Secretary claimed any authority under 8 U. S. C. § 1185, since his regulations purported to be based upon 22 U. S. C. § 211a. As we have indicated earlier, the claim of authority as flowing from 8 U. S. C. § 1185 is being made for the first time in this Court. Since the Secretary did not claim to be acting under the authority of 8 U. S. C. § 1185 at the time he took the action complained of against the petitioners, there was no occasion for the petitioners to challenge the constitutionality of a statute which was not being invoked.

[12] We challenge below, pp. 22-28, the claim that any emergency justifying restrictions upon travel existed in 1955 when petitioners applied for passports.

who may and those who may not travel. In addition, says the Government, "By making the passport the instrument for effecting control, Congress has also limited the exercise of the control power to cases relating to the national defense and the related conduct of foreign affairs in time of war or emergency" (Gov't Br. p. 97).

But this vague language furnishes no standards or guide whatsoever as to who may travel and who may not.[13] The Government asserts that "We need not be concerned with the question of whether a delegation of travel control power with no limitation * * * would be valid" (Br. p. 97) But, although the Government refuses to meet the challenge posed by that question, that is precisely the question before this Court—since 8 U. S. C. § 1185 contains no standards whatsoever.

The Government's brief is of assistance on this point precisely because of the multiplicity of vague criteria which it proposes to read into the statute. A few examples will suffice:

> (a) "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs"[14] (Gov't Br. p. 92)
>
> (b) "the executive should have wide discretion and wide authority of action"[15] (Gov't Br. p. 94)

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[13] See *e.g.*, the "public good" is not an adequate standard. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Nor is any adequate standard furnished where the licensing authority may grant a permit when he "deems it proper or advisable", *Largent* v. *Texas*, *supra*; or where it is not "prejudicial to the best interests of the people." *Gelling* v. *Texas*, *supra*.

[14] This is a partial quotation from Judge Fahy's *dissenting* opinion in the Court below (R. 72-73) which recognizes the absence of "more specific criteria" (R. 72) and admittedly attempts to give "valid content" to the statute (R. 73) in view of the constitutional problems involved.

[15] The source is a Committee report on the 1918 wartime statute, H. Rep. No. 485, 65th Cong., 2d Sess.

(c) "'preventive measures against activities that may cause international misunderstandings * * *'" [16] (Gov't Br. p. 95)

(d) the President's "broad discretion" in exercising "the foreign affairs powers" (Gov't Br. p. 95).

Not a single one of these alleged standards—none of which appears in the statute—can be supported under the decisions of this Court on the subject of delegation of authority.

In *Schechter* v. *U. S.*, 295 U. S. 495, and *Panama Refining Company* v. *Ryan*, 293 U. S. 388, the statutes involved made elaborate declarations as to the national emergency which unquestionably existed. In addition, the statutes and regulations involved in those cases related exclusively to matters of business; not to the exercise of First Amendment rights. Nevertheless, the broad authority found by the courts to have been given to the President was held to constitute an unlawful delegation of authority. In the *Panama Refining* case, Chief Justice Hughes stated:

> "* * * It gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment," (p. 415)

and

> "If the Congress can make a grant of legislative authority of the sort attempted by Section 9(c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. * * *" (p. 420)

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[16] District Judge Holtzoff's opinion in *United States* v. *Peace Information Center*, 97 F. Supp. 255, 261 involving a very different statute.

This last passage is most applicable to the present case where, indeed, it was not the President but the Secretary of State who established the classifications of persons whose movements were to be restricted.

The regulations herein under attack—if they can be deemed to have the support of the statute—must fall under Mr. Justice Cardozo's statement in *Schechter Corp. v. U. S.*, 295 U. S. 495, 551:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion, *Panama Refining Co. v. Ryan*, 293 U. S. 388, 440."

The Government argues, secondly (Br. pp. 93-97), that since the power delegated is in the field of foreign affairs, the standards need not be as precise as in other fields. But there are two fallacies to this contention. In the first place, it cannot be argued that a vague standard rather than a precise standard would suffice here in the face of the fact that there is no standard prescribed, vague or precise. Secondly, as we have established in our main brief and as indicated by Judge Bazelon below (R. 225-238) the power exercised here is not the conduct of foreign affairs.

The cases cited by the Government do not support its contention that legislative power may be delegated in such vague terms. The alien cases relied upon by the Government rest upon the dual doctrine that aliens have limited rights and that the executive has inherent power to control their movements: See *U. S. ex rel. Knauff v. Shaughnessy*, 338 U. S. 537; *Shaughnessy v. U. S. ex rel. Mezei*, 345 U. S. 206.

Thus, in the *Knauff* case, the Court stated at 542-3:

> "At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right * * *.

"Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power, but there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. * * *. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

"Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive * * *. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e. g., as was done here, for the best interests of the country during a time of national emergency * * *."

See also *Mezei*, 345 U. S. 206 at 210.

Neither of the principles supporting the validity of the delegation in these cases has any applicability here.

Nor does *United States* v. *Curtiss Wright Corporation*, 299 U. S. 304, lend any support to the government's contention. In that case, the delegation of power to the President was in fact quite precise. It empowered the President to invoke an embargo on arms in the case of a specific armed conflict then currently proceeding between the countries of Bolivia and Paraguay. The delegation was narrow and confined to a very specific situation. Moreover, in sustaining the delegation, the Court emphasized that it was necessary to delegate power since negotiations with other countries were involved. Thus, the Court said at pages 319-320:

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—*a power which does not require as a basis for its exercise an act of Congress* * * *. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, *congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissable were domestic affairs alone involved.* * * *" (Emphasis supplied.)

Here, of course, the statute and the action of the executive claimed to be authorized under the statute do not in any respect involve negotiations with foreign powers.

As a demonstration that the nature of the power exercised by the Secretary in classification of the citizens who may and those who may not travel is legislative in character, we need only turn to the Government's Brief. In support of the reasonableness of the regulations and of the action of the Secretary, the Government, at pages 60-73, elaborately sets out the policy considerations underlying the Secretary's classification. The materials upon which it relies—governmental reports and congressional hearings—are characteristically the type of materials normally employed by Congress in enacting legislative measures and in supporting the reasonableness of these legislative measures. But as we have demonstrated in our main brief (Br. 29), the executive has no power to enact legislation, and all of the considerations so elaborately set out by the Government in its brief were appropriate considerations for Congress and not for the Secretary of

State, for under our constitutional scheme, it is not the function of the Secretary to make policy judgments of that character.[17]

Since, as acknowledged by the Government, the constitutional right to travel abroad is to be equated with the right to travel from state to state, the situation is no different than if the Attorney General had, in the absence of clear and unequivocal legislative authorization, issued regulations forbidding the travel of Communists or Communist sympathizers from one state to another, and had argued in this Court in justification of such a prohibition considerations similar to those recited by the Government here. Clearly, such an assertion of power would be rejected on the basis of want of authority in the Attorney General without any consideration as to whether Congress could or could not constitutionally enact such restrictions; or whether the policy considerations adduced by the Attorney General justified his action. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146; *Curtis* v. *Benson*, 222 U. S. 78.

Similarly, the argument of the Government (Br. pp. 52-53) that Congress can delegate to the Secretary of State authority "to prevent, where necessary or appropriate the departure or entry of individual citizens" would by implication sanction a delegation of power to the Attorney General in a time of national emergency to impose restrictions on citizens' freedom to speak and write "where necessary or appropriate." According to the Government's logic (Gov't Br. pp. 92-93), such a delegation would not be invalid because (a) it would be limited to a period of national

[17] Moreover, as we pointed out in our main brief (pp. 31-36), it was on the basis of these identical considerations that Congress enacted the prohibitions upon the granting of passports contained in the Internal Security Act of 1950. And it is not for the Secretary to differ with Congress as to the remedies to be enacted to meet the declared evil. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

emergency, and (b) the Attorney General's restrictions upon freedom of speech, press and assembly would be subject to the constitutional limitations of the First and Fifth Amendments. In short, the Government takes the untenable position that Congress may delegate to the Executive the power to impose such restrictions on constitutional rights as the Executive may deem "necessary or appropriate," subject only to the condition that the restrictions conform with due process of law.

II

Assuming the Existence of Power in the Secretary to Control Travel, the Regulations Violate Constitutional Rights

A. "Reasonable Restrictions" Upon a Fundamental Right

After conceding the fundamental constitutional character of the right to travel (Gov't Br. pp. 26-27) the Government treats the entire constitutional problem raised by its regulations in a few pages at the end of its brief bearing the significant title "THERE IS NO CONSTITUTIONAL OBJECTION TO THE SECRETARY'S REFUSAL TO ISSUE PASSPORTS, FOR FOREIGN TRAVEL, ON GROUNDS *related* TO PRESENT OR *negr-past* COMMUNIST PARTY MEMBERSHIP" (Gov't Br. p. 89; emphasis supplied).

In support of this proposition the Government argues that it may place "reasonable restrictions" upon the travel of its citizens, and that this Court's decisions in *American Communications Association* v. *Douds*, 339 U. S. 382, and various alien deportation cases are an answer to petitioners' First Amendment claims (Gov't Br. pp. 67-69).

We do not think that the Government can concede the basic character of the right of movement which we have discussed in our main Brief, pages 18-24, and then seek to undercut that right by the concept of "reason-

able restrictions" (Gov't Br. p. 89). The right of movement, of locomotion, of travel is of so fundamental a character that it is preposterous to suggest that it is subject to regulation on the same grounds of reasonableness that are applicable to business regulation.

> "* * * Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. * * *" Mr. Justice Frankfurter concurring in *Kovacs* v. *Cooper*, 336 U. S. 77, 95.

Restrictions upon movement from one country to another are, as we have previously indicated (see main Brief p. 23), only different in degree from confinement to more constricted areas, such as imprisonment, internment and concentration camps.[18] That this point has not escaped the Government is indicated by its reliance upon the English internment cases in the two World Wars, *Rex* v. *Halliday* (*Ex parte Zadig*) [1917] A. C. 260; *Liversidge* v. *Anderson* [1942] A. C. 206; *Greene* v. *Home Secretary* [1942] A. C. 284; *Rex* v. *Home Secretary* (*Ex parte Budd*) [1942], 2 K. B. 14 (Gov't Br., *Dayton* v. *Dulles*, No. 621, Oct. Term 1957, pp. 53-54, 72-74). And equally significant and disturbing is the Government's reliance herein upon the Japanese internment cases; *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81 (Gov't Br. pp. 87, 91, 94).

We note these references only to indicate agreement that the essential constitutional problems in all these re-

[18] See also South Africa's existing system of pass laws and "Group Areas Acts". Gardiner, *The South African Treason Trial*, I Journal of the International Commission of Jurists 42, 45 (1957). Cf. Brecht, *The Concentration Camp*, 50 Col. L. Rev. 761 (1950); Bramstedt, *Dictatorship and Political Police* (1945) 118 *et seq.*

strictions upon movement are the same. The differences in the Government's power in the two kinds of cases will be discussed below when we address ourselves to the alleged existence of a national emergency.

The Government's citation of authority for the proposition that "reasonable restrictions" may be placed "upon the travel of its citizens" (Gov't Br. pp. 89-90) is quite surprising. *Blackmer* v. *U. S.*, 284 U. S. 421, involved a very different problem, the enforcement of a citizen's duty "to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned" (*Id.* at 438). On the same theory every witness summoned before a grand jury or court is to that degree compelled to be where he would prefer not to be; yet no one would suggest that this authorizes the Government to place "reasonable restrictions" upon the travel of its citizens inside the United States itself.

The reference to Jefferson's draft of a Fundamental Constitution for the Commonwealth of Virginia (Gov't Br. p. 90) means no more than what *Blackmer* holds, namely, the duty of a citizen to return to his country to carry out his duties of citizenship.

The conscription cases upon which the Government relies (Br. p. 94) do no more than enforce the citizen's obligations even though the performance of those obligations may be in distant lands. The Government does not contend herein that the petitioners' travel for the purposes indicated will in any way prevent them from carrying out their obligations as citizens.

In addition, the restriction upon the free movement of citizens carries with it substantial limitations upon their exercise of their freedoms of speech and association. The relationship between these two principles—that of movement and of speech—has been noted in our main Brief (pp. 22-24) and has best been stated by District Judge Wyzanski

in an article which deserves full reading. (Wyzanski, *Freedom to Travel*, Atlantic Monthly, October 1952, 66.) Freedom of speech, to be meaningful, must carry with it the right not only to say what one will but where one will. Dr. Briehl, for example, wishes to exercise his right to freedom of speech and professional association in Europe. If, indeed, the right of travel may be assimilated to that of speech, what is there in this Court's decisions that authorizes "reasonable restrictions" upon freedom of speech?

We are not discussing convictions for disorderly conduct by reason of speeches already made and which constitute a breach of the peace, *Feiner* v. *New York*, 340 U. S. 315; or speech advocating violent overthrow under circumstances of danger to the Government which may warrant restrictions on First Amendment rights, *Dennis* v. *United States*, 341 U. S. 494, but see *Yates* v. *United States*, 354 U. S. 298; nor even about permits to use city streets and parks. *Cf. Hague* v. *C. I. O.*, 307 U. S. 496, and *Cox* v. *New Hampshire*, 312 U. S. 569. The petitioners are not seeking to use any public facilities whatsoever. They are being prevented from doing something in the future and this proscription is a form of prior restraint, a matter discussed further below (pp. 29-31). (See Emerson, *The Doctrine of Prior Restraint*, 20 Law and Contemp. Prob. 648 [1955].)

B. The Alleged Emergency

The Government is in error in assuming (Gov't Br. p. 72) that petitioners concede the existence of a national emergency and one which could constitutionally justify restrictions upon freedom of movement.

Many things are done and may be done in time of actual war which cannot constitutionally be done in time of peace, no matter in what horrendous terms the Executive may describe the current situation. There is a qualitative difference between armed conflict or actual danger of invasion,

and the political warfare which has been going on this past decade. See Mr. Justice Burton, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 582.

The English internment cases are a good example of what was believed to be a necessary act of self-defense on the part of the Government. Yet, even there we found dissent among the judges.[19] The Japanese internment cases were another example; there, also, it is believed by many that we went too far. (See authorities collected in Emerson and Haber, *Political and Civil Rights in the United States* (1952) 597, and particularly, Rostow, *The Japanese American Cases—a Disaster* (1945), 54 Yale L. J. 489.) The situation today has no similarity to the "grave national danger" referred to in *Liversidge* v. *Anderson*, *supra*, page 252. Neither before the Korean conflict nor during it nor after it has there been a problem comparable to that presented by the internment cases, American or English, and one which would justify preventing the movement of American citizens to the European continent. There is no war, the United States and the Soviet Union have diplomatic relations, the citizens of the Soviet Union and other

[19] It should be noted that the English cases relied upon by the government were decided in an entirely different constitutional framework. Since England does not have a written Constitution, the judiciary there, unlike the situation here, has neither the power nor the responsibility of reviewing legislation to determine whether or not it conforms with constitutional requirements. Moreover, so far as English practice may be looked to to determine the reasonableness of the action complained of here, it is significant that England has not adopted in any measure the restrictive practices on travel imposed by our State Department, even though it may fairly be assumed that the supposed danger facing this government as the result of travel by alleged Communist sympathizers is equally present in England. The English attitude is interestingly reflected in a recent issue of *The Economist*, March 29, 1958, p. 1124, quoting from its issue a century ago, March 27, 1858: "It has been laid down with good sense by the English Government that a British passport simply identifies a man by name as a British citizen, and neither can nor ought to attempt anything further. * * *"

members of the Eastern bloc travel to the United States for purposes of education, culture, sports and pleasure, and we reciprocate.[20] This is a far different situation from that of war-time where no one is permitted to go into enemy countries or areas of armed hostility except for purposes which would aid the war.

The distinction between a necessary restriction upon movement caused by war and the kind of political operation involved herein is indicated by the detention provisions of the Internal Security Act of 1950. These authorize the President to intern "each person as to whom there is reasonable ground to believe that such person probably will engage in or probably will conspire with others to engage in acts of espionage or of sabotage," 50 U. S. C. § 813, during an "internal security emergency". Such an emergency may be declared only in one of the following cases: "(1) Invasion of the territory of the United States or its possessions, (2) Declaration of war by Congress, or (3) Insurrection within the United States in aid of a foreign enemy."

The original bill authorizing this detention provision contained a fourth condition upon which the President might declare the emergency, namely: "Declaration of an 'internal security emergency' by concurrent resolution of the Congress." (96 Cong. Rec. 14581.) This provision was stricken from the bill because of the opposition of Senators McCarran, Ferguson and others who insisted upon a limitation of the circumstances under which American citizens could be detained. (96 Cong. Rec. 14585-6, 14591-2, 14598, 14623 [1950].)

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[20] See also *e.g., Exchange of Medical Films*, Agreement between the United States of America and the Union of Soviet Socialist Republics, Dep't of State (1955), Treaties and other International Acts Series 3409.

We did not and do not view 8 U. S. C. § 1185 as a grant of power to the Secretary to impose political tests on the movements of American citizens. In view of the fact that 8 U. S. C. § 1185 was not operative at the time the Regulations were promulgated and therefore could not be a source of power, and that the Secretary relied in the preamble to the Regulations and in the courts below exclusively upon 22 U. S. C. § 211a and his inherent power—both of which are now discarded—he was evidently of the same opinion. Therefore, we did not believe it necessary previously to consider the problem as to whether world conditions are such as to justify the declaration of a national emergency which entailed as a consequence the control of travel on political grounds.

However, if 8 U. S. C. A., § 1185 were to be regarded as an authority for the regulations which antedate it, we do contend that nothing in world conditions or otherwise can rationally justify the refusal of the State Department to permit the petitioners to travel abroad for the purpose of promoting their professions. In other words, whatever national emergency does exist is irrelevant to and furnishes no occasion to deny the right of the petitioners to travel abroad on the basis of the facts shown in this case. Moreover, it is unnecessary for us to consider here the extent of restrictions on travel that would be permissible in the event of actual war, as envisioned by the 1918 and 1941 statutes. Suffice it to say that even if the President is authorized today to declare a national emergency for some purposes, the extent of restrictions that may be justified by such an emergency cannot be equated with the type of restrictions that might be reasonable in the event of an actual outbreak of war. Cf. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; and even in the event of a war, the determination as to the rationality of any particular measure must depend upon the actual nature of the critical situation facing the country. *Hirabayashi* v. *United States*, 320 U. S.

81. Thus, the action taken in the *Hirabayashi* case would not have been upheld under the circumstances of World War I.

Let us assume that, as the Government contends, 8 U. S. C. § 1185 authorizes travel control in the event of a Presidential declaration of national emergency. This would not insulate the declaration from judicial scrutiny to determine whether the emergency exists and whether it is a justifiable basis for the controls. This is particularly true where the controls are sought to be imposed some years after the declaration of emergency. In the *Chastleton* case Mr. Justice Holmes stated with respect to an emergency declaration by a *legislature* that

> "* * * a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * * And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. * * *" (264 U. S. at 547-548.)

In that case, this Court held that, had the case revolved around the existence of the emergency at the time of its consideration by the Supreme Court, it would have taken judicial notice of the fact that there no longer existed in the District of Columbia a housing emergency sufficient to validate the Rent Control Act of 1919, as successively reenacted. It remanded the case to the trial court for a determination of the facts because the existence of the emergency at different times was deemed material.

In *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, Mr. Justice Frankfurter, in upholding the constitutionality of the 1943 extension of New York State's Mora-

torium Law, distinguished *Chastleton* as dealing with "quite a different situation" (326 U. S. at 235). The difference lay in the care and frequency with which the legislature had renewed the law from time to time, and adjusted its terms, based in each case on a full investigation of the facts:

> "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. * * * —* * *." (326 U. S. at 234-5.)

See also *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 433.

In *Woods* v. *Miller*, 333 U. S. 138, 147, Mr. Justice Jackson's concurring opinion upholding federal rent control in 1948 denied however "that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."

The Court of Appeals for the Ninth Circuit in a recent opinion upholding the judicial power to look behind a presidential declaration of national emergency relating to possession of gold bullion, made an observation even more striking in its applicability to personal liberties:

> "It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing. Of course if it seems essential to continue the subject matter of these criminal regulations now, Congress can so declare. But the power lies in Congress." *Bauer* v. *United States*, 244 F. 2d 794, 797.

We submit that whatever may be the powers of the Government in a situation of actual war such as existed at the time of the Act of 1918 and was reflected in the national emergency statute of 1941, there is no emergency at the present time which could possibly justify the restriction upon travel of American citizens to countries to which millions of Americans are permitted to and do travel annually—particularly where the basis of the denial of the right is concededly the exercise of right of association which we next discuss.

C. The First Amendment

The Government seeks to meet our First Amendment argument [21] (main Br. pp. 39-47) in several ways.

First, it tells us with lurid quotations that passports have been forged or fraudulently used by Russian agents. (Gov't Br. pp. 60-62). Such crimes, cognizable under 18 U. S. C. §§ 1541-1546, are completely irrelevant to the constitutional problems involved in this case. The petitioners are American citizens seeking valid passports from their government for legitimate professional purposes. They are being denied these passports because of allegations that they made statements and had associations—for the most part many years ago—admittedly lawful and within the protection of the First Amendment, but of which certain government officials disapprove.

The commission of crime by one group of persons cannot be a justification for the denial to another group of the *future* exercise of fundamental rights of speech, association and movement—particularly where the denial is based upon their *past* lawful political conduct. Further, since the Regulations of August 28, 1952 were an attempt to comply with "the spirit" of the Internal Security Act (see our main Br. pp. 35-36) which is directed against Com-

[21] The government's suggestion that the First Amendment might not have been relied upon by petitioners (Gov't Br. p. 78) can hardly be made seriously. See *e.g.*, R. 3, 33, 58, 102, 118, 172. This was the very issue decided by the Court below. R. 192, 201, 217.

munism—not espionage—the Government's present attempt to invoke 8 U. S. C. 1185 is "like most afterthoughts in litigated matters * * * without adequate support in the record." Chief Justice Stone, concurring in *Hague* v. *C. I. O.*, 307 U. S. 496, 522.

In the Godkin Lectures of 1955, Mr. John Lord O'Brian has cogently analyzed various of our contemporary infringements of liberty including the "supervision and limitation of the freedom of travel by American citizens" (O'Brian, *National Security and Individual Freedom*, [1955] p. 48). In words directly applicable to the Government's present attempt to introduce the espionage theme, he notes: "Attempts are sometimes made to justify these restraints as necessary to prevent sabotage and espionage, but affirmative evidence casts some doubt on this plausible excuse" * * * (*Id.*, 49). The purpose and effect of such procedures he reminds us, is "to constrain the freedom of thought and of association on the part of the individual". (*Id.*, 26).

Secondly, the Government now refers to "grounds related to present or near-past Communist Party membership". (Gov't Br. p. 89). We call attention to two aspects of this careful phrasing:

The term "grounds related" *supra*, p. 19, points up what we have said before in our main Brief, pp. 39-47, that Communist Party membership is only one factor in the standards and inquiry under the Secretary's regulations. The heart of the regulations is § 51.135(b) which refers to "activities which support the Communist movement" (Petrs' Br. p. 2). An examination of the allegations against both petitioners will show that the denial of passports to them is, in fact, predicated upon this kind of lawful activity; hence, the use of the word "related" is quite appropriate from the Government's point of view.

The second significant point is the Government's reference to "near-past Communist Party membership" (Br. p. 89). This phrase suggests a recognition of its lack

of right to enquire into Communist Party membership which is not "near-past". Yet 51.142 of the Regulations requires the applicant to make a full disclosure as to present and past membership in the Communist Party. The regulations do not suggest, nor does the Government, that a partial disclosure would suffice.

We now come to the heart of the Government's argument on the constitutional issue. It says that passports can be denied to persons who have a "connection with the world Communist movement" because "foreign travel which is purportedly innocent in purpose may well turn out to be an instrument of the Soviet Union—for espionage, for communication of information, as a courier, for the other uses to which a firm adherent of another power may be put" (Gov't Br. p. 98). This is an insulting comment to make, even in the abstract, in a case involving respected members of the community who have never been charged with any crime and whose sworn statements of specific reasons for travel have never been challenged by the Government.

In any event, from a constitutional point of view, we submit that this test cannot be upheld. The Government does not have the right to prevent a citizen from engaging in a lawful activity—such as travel abroad either to paint pictures or represent medical societies at international conventions—because in the Government's view it "may well turn out" to be otherwise.[22] This is indeed the doctrine of prior restraint with a vengeance. It "may well turn out" that American citizens who have had a so-called "connection with the world Communist movement" may commit crimes within this country, yet no responsible person would dare suggest their internment.

The Secretary's passport policy is part of the "new system of preventive law applicable to the field of ideas

[22] On the Government's theory, the Secretary could lawfully prohibit, for the same political reasons, the travel for health of the physically ill recently discussed in Rusk, *Tours for the Disabled*, The New York Times, April 6, 1958, p. 48.

and essentially different from traditional American procedures" [23] (O'Brian, *supra*; p. 22).

Whatever may be the relative freedom from constitutional limitations of government control over its employees, see *Garner* v. *Board of Public Works*, 341 U. S. 716, this Court's view of preventive law is quite clear. In *Near* v. *Minnesota*, 283 U. S. 697, 720, it said: "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." In *Schneider* v. *State*, 308 U. S. 147, 162, *Lovell* v. *Griffin*, 303 U. S. 444, 451-2 and *De Jonge* v. *Oregon*, 299 U. S. 353, 365, this Court rejected a system of prior restraint. See also Field, J. in *In re Ah Fung*, 1 Fed. Cases 213, 217 (D. Calif.).

Two further observations are appropriate:

(1) The nature and purpose of the sanctions here imposed justify the authoritative reminder that "there can be no conviction for a criminal attempt without proof of a specific intent to effect some consequence which constitutes a crime." Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 841 (1928). For lacking here are both elements: the act and the intent.

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[23] As Mr. O'Brian points out:

"* * * Until these new administrative policies were adopted, this nation had adhered firmly to the traditional Anglo-American method of combating activities of an antisocial character. Under that policy no direct attempt was made by law to prevent the wrongful act before it was committed other than by warning the citizenry generally of what the consequences would be. Once the wrongful act had actually been committed, its author and only the author was punished by the state. This elementary principle had long been embodied also in civil procedures.

"The advantage of this age-long legal system lay in the relatively precise selection that was made centering upon the wrongdoer, leaving the rest of the community free from direct governmental action * * *." (O'Brian, *supra*, pp. 22-23).

See also Brunstedt, *supra*, note 18, p. 139, critically quoting the notorious Reinhard Heydrich: "According to the liberal school of thought, only action inimical to the state and the organization of the enemy of the state, which makes this action possible has been combated: National Socialism, on the other hand, is concerned with the intellectual forces of the opponents. It is they whom it wants to reorganize and strike."

(2) And since the Government argues that petitioners' First Amendment rights must yield to national security, it must be reminded that *Schenck* v. *United States*, 249 U. S. 47, and its successors, were based upon consummated acts, not upon undefined dangers speculatively conceived to be possible in the future.

The Government's view as to who is a "Communist Party member or under party control" has been shown to be so latitudinous as to be devoid of rational basis. This matter cannot be dealt with in the abstract. Whether we study the cases of Dr. Linus Pauling and Dr. Otto Nathan and many others discussed in the Henning's Committee hearings (our main brief, pp. 43-44), or review the particular associations attributed to petitioners—it is clear that to the Secretary the lawful exercise of First Amendment rights through connection with organizations on the Attorney General's list is equivalent to Communist Party membership and Party control.

American Communications Association v. *Douds*, 339 U. S. 382, does not afford the slightest justification for the broad power sought herein. In that case, this Court approved of what it regarded as an indirect form of pressure upon labor unions to get rid of Communist Party leaders by otherwise denying them the use of the facilities of the National Labor Relations Board. The statute therein involved did not require non-Communist affidavits as a condition to the exercise of any fundamental right. It did not provide, for example, that the unions could not function, engage in collective bargaining, call strikes, and organize workers. It did not prevent Communists from being officers of the union. It deprived those unions of a specific benefit, whose importance we would not minimize, but which nevertheless left the unions free to function as at least two great unions have continued to do to this date. See *National Labor Relations Board* v. *District 50, United Mine Workers*, Oct. Term 1957, No. 64, 26 U. S. Law Week 4129; *American Newspaper Publishers Association* v. *National Labor Relations Board*, 345 U. S. 100.

The Court was moved, as it said, by a Congressional finding that Communists called political strikes, by the small number of persons it believed to be affected, and by the responsibility which the unions were deemed clothed with by reason of the special advantages given to them by the National Labor Relations Act. This is indicated by the following sections of Chief Justice Vinson's opinion:

> * * * "The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself. [Citing cases]
>
> "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become government agencies or may be regulated as such. But it is plain that when Congress clothed the bargaining representative "with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents' the public interest in the good faith exercise of that power is very great." 339 U. S. 382, 401-402.

The Government would read *Douds* as supporting the proposition that any sanctions imposed upon Communists are lawful. But this Court, on the contrary, although upholding the particular sanction there imposed because of the special circumstances involved, was careful to note that "political affiliations and beliefs * * * are circumstances ordinarily irrelevant to permissible subjects of government action" (p. 391). Moreover, *Douds* dealt with a congressional mandate based upon Congressional findings, and the Court repeatedly noted that its holding was rendered in deference to the legislative judgment (see pp. 388-389, 391, 393, 400-401, 404, 406).

There is nothing in the legislative history of 8 U. S. C. § 1185 which would suggest a congressional conclusion

(1) that members of the Communist Party, past or present, or of organizations on the Attorney General's list, past or present, should be denied the right to travel, or (2) that this extraordinary means of implementing the statute, namely, an affidavit as to political associations, was authorized by the Congress.

Surely the Congressional standards and procedures of the Internal Security Act, and the quasi-judicial procedures imposed in *Dulles* v. *Nathan*, 225 F. 2d 29, are "reasonable and adequate alternatives" to the Secretary's Regulations. See *Dean Milk Co. v. City of Madison*, 340 U. S. 349, 354.

By the Government's own claims, the statutes of 1918 and 1941 were directed not at matters of Communist association but at the far more serious problem of espionage and sabotage. We do not concede that Congress could have required, as it has *not* either in the Internal Security Act of 1950 or in 8 U. S. C. § 1185 a non-Communist affidavit from the would-be traveller. But there is a constitutional difference between what Congress may demand and what a subordinate official may demand. This Court's recent decisions emphasize its principal concern, namely, has Congress authorized this intrusion into rights protected by the First Amendment. *Watkins* v. *United States*, 354 U. S. 178; *Cole* v. *Young*, 351 U. S. 536; *United States* v. *Minker*, 350 U. S. 179; and *United States* v. *Witkovich*, 353 U. S. 194. In each of these cases, involving different aspects of the problem, this Court has made it clear that it will require an unambiguous mandate from Congress before either Congressional committees, the President, or administrative officials can require answers to questions of this kind or impose sanctions for such conduct.

The reasonableness of this limitation stems, in the first instance, from the deference which the Court will give to a coordinate branch of the Government, a deference to which an administrative official is not entitled. There is another reason, namely, that the limitations imposed by a statute

are usually not to be found in administrative behavior. Thus, *e.g.*, while Section 9(h) of the National Labor Relations Act requires an affidavit only as to *present* Communist Party membership—thus permitting the union officer to resign from the Communist Party and retain his official union position—the Secretary of State requires an affidavit as to past Communist Party membership. Secondly, he is interested in a panoply of activities other than the Communist Party membership which we need not again discuss; and thirdly, he not only wants the facts but he seeks to probe by asking for explanations, justifications and proof.[24] Hence, the requirement that the citizen desiring to travel "submit any evidence of anything that you have done which has been opposite to the Communist Party line" (R. 62).

The attempted examination of petitioners (R. 34-64, 127-150) is similar to that so critically analyzed by this Court in *Schneider* v. *State of N. J.*, 308 U. S. 147, 163-4:

> "* * * The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial 'examination, including photographing and finger-printing. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion."

Nor is there any merit in the Government's suggestion that the affidavit requirement may be sustained as merely a request for information (Br. 86-89). The Regulations (§ 51.142) unequivocally provide that if the affidavit is affirmative as to present membership, a passport will be denied. Accordingly, the Government's discussion on the hypothesis that membership alone is not a ground for de-

[24] *Cf.* the practice under the National Labor Relations Act, whereby the Board is bound by the non-Communist affidavit. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145.

nial of a passport is entirely misplaced. Moreover, it is clear both from the regulations and the allegations made against the petitioners that Communist Party membership is the ultimate in ineligibility for travel abroad, and that there is and can be no more disqualifying characteristic. As pointed out in our main brief (p. 41), such a disqualification on the basis of Communist Party membership without more is invalid because of its disregard of the requirement of *scienter*. The Government has nowhere responded to this argument.

Conclusion

The Government's lengthy brief fails to disclose a statute which authorizes the drastic measure here under review: the administrative prohibition of an American citizen's travel for lawful professional purposes by reason of his lawful associations, writings and opinions. Whether Congress could constitutionally accomplish the same objective is most doubtful but need not be decided here.

Respectfully submitted,

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